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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 71-497

MARY ANTIPOROVITCH KOTSAK,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No.

MARY ANTIPOROVITCH KOTSAK,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Opinion Below

The only opinion below is that of the Superior Court of New Jersey, Appellate Division, unreported, and appended hereto.

Statement of Jurisdiction

The date and time of entry of the order of the Supreme Court of New Jersey, denying certification for review of the judgment of the aforesaid Appellate Division, is September 21, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question and the order denying certification thereof is 28 U.S.C.A. sec. 1257(3).

Questions Presented for Review

1. Did the informant's tip recited in the affidavit upon which the search warrant was issued establish probable cause?

2. Taken in combination, did said informant's tip and the recited observation by the State Police Investigator establish probable cause?

3. Did the terms of the warrant justify entry or search of the kitchen or any other part of the petitioner's living quarters?

Constitutional Provision Involved

The Fourth Amendment to the Constitution of the United States, U.S.C.A., Constitution volume, page 102, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Statement of the Case

The petitioner was convicted upon a jury verdict in the Middlesex County (New Jersey) Court for (a) engaging in a lottery business and possessing lottery slips in violation of N.J.S.A. 2A:121-3; (b) bookmaking and maintaining a gambling resort in violation of N.J.S.A. 2A:112-3. She was sentenced to the New Jersey Reformatory for Women for an indeterminate term, to run concurrently, on each of the 4 counts of the indictment; and was also fined a total of $6,000.

In lieu of a detailed recitation of the search-warrant proceedings which form the subject of the review had in the courts below and sought here, we respectfully refer this Court to the third, fourth, fifth, sixth, seventh and eighth paragraphs of the opinion of the Appellate Division, appended hereto.

Raising of Federal Constitutional Question Below

The first time that a federal constitutional question, viz., the Fourth Amendment, was *expressly* raised below was in the petition for certification addressed to the Supreme Court of New Jersey. See Points Two and Three in the Argument portion of said petition, submitted herewith.

As stated in the opinion of the Appellate Division (page 4A of the Appendix hereto, second paragraph), no timely motion to suppress was made. However, at the trial the judge allowed petitioner to attack the sufficiency of the warrant. He then upheld the search in all respects.

However, it is not necessary to state, in terms, upon the record, that the Constitution of the United States was drawn in question. It is sufficient, as here, if the Fourth

Amendment must have been misconstrued, or the decision could not have been made. *Willson* v. *Black Bird Creek Marsh Company,* 2 Pet. 245 (1829). "If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches." *Furman* v. *Nichol,* 8 Wall. 44, 56 (1868). Compare *Dewey* v. *Des Moines,* 173 U. S. 193, 199, 200 (1899).

In petitioner's brief in the Appellate Division, submitted herewith, the table of contents sets forth the following points of Argument:

> "Point I. There was clearly no justification for the issuing judge's conclusion that the affidavit showed probable cause.
>
> "A. The reliable-information recital in the affidavit.
>
> "B. The investigating officer's own observations.
>
> "Point II. The terms of the warrant did not justify entry or search of the kitchen or any other part of the defendant's living quarters.
>
> "Point III. The fact that the warrant commanded search of the defendant's person did not justify entry or search of the kitchen or any other part of the defendant's living quarters."

Though the foregoing points do not expliictly set up a violation of the Fourth Amendment, that constitutional privilege would seem to be within the clear intendment of the contentions recited above. See *Braniff Airways* v. *Nebraska Board,* 347 U. S. 590, 599 (1954).

Reasons Why Certiorari Should Be Allowed

ARGUMENT

(Italics ours unless otherwise stated.)

POINT I

The informant's tip recited in the investigator's affidavit did not establish probable cause.

In paragraph three of his affidavit, Investigator Walsh states (Da3-17 to 4-4):

> "On Friday, December 6, 1968 a reliable informant whose information has proved reliable in the past and has led to convictions for gambling, informed this officer that males and females were delivering lottery numbers and numbers to Mary Kotsak at the delicatessen at 169 Pulaski Ave., Perth Amboy, New Jersey between the hours of 1:00 P.M. and 4:00 P.M., informant also informed this officer (4a) that lottery numbers are also telephoned into this store from the various taverns in the Perth Amboy area."

That recital was not entitled to any credit whatever. In *Spinelli* v. *United States,* 393 U. S. 410, 21 L. Ed. 2d 637, 643 (1969), the court says:

> "• • • we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. • • • The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli

> was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him."

And on page 644:

> "* * * Here, the only facts supplied were that Spinelli was using two specified telephones and that these telephones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."

See, also *State* v. *Hutchins,* 43 N. J. 85, 97 (1964).

POINT II

In upholding the warrant at bar, the Appellate Division has misapplied the applicable principles laid down by the Supreme Court of the United States and has not decided in accordance with the decisions of such court. The decision of the Appellate Division further conflicts with the provisions of the Fourth Amendment to the United States Constitution.

The provisions of the constitution just cited in the foregoing headnote command this:

> "The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and par-

> ticularly describing the place to be searched and the papers and things to be seized."

There was no oath in this case that *supported* probable cause. This is so for the following reasons:

1. The informant's suspicions were not corroborated to the level of probability. In the ninth paragraph of its opinion, the Appellate Division says:

> "• • • However, where properly corroborated, an informant's suspicions may be elevated to the level of probability. This will occur when *corroborative* observations 'confirm *enough* of what the *informant* has *disclosed* so that the *balance* of his disclosures are invested with an aura of credit.' • • • An insufficient tip may be taken together with other corroborative events in order to formulate probable cause. Similarly, when 'independent observation *corroborate sufficient details* of the tip (whether suspicious or not) to negate the possibility that the informer "fabricated his report out of whole cloth,"' probable cause may be found,"

citing *State* v. *Christy,* 112 N. J. Super 306 (Cty. Ct. 1970); *Draper* v. *United States,* 358 U. S. 307 (1959); *Gonzalez* v. *Beto,* 425 F. 2d 963 (5 Cir. 1970).

Let's look at those cases. In *Draper* v. *United States, supra,* at page 313 of 358 U. S., it appears that when, in pursuing the informant's information, the arresting officer, Marsh,

> "saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that (the informant) had described, alight from one of the very trains from the very

> place stated by (the informant) and start to walk at a 'fast' pace toward the station exit, Marsh had personally verified every fact of the information given him by (the informant) except whether (Draper) had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of (the informant's) information being thus personally verified, Marsh had 'reasonable grounds' to believe that the remaining unverified bit of (the informant's) information—that Draper would have the heroin with him—was likewise true."

In the case at bar, the informant's tip stated that (a) between 1:00 P. M. and 4:00 P. M. men and women were *delivering* lottery numbers to the delicatessen, and (b) numbers were being reported into the store by telephone. *Neither* item was corroborated by *anything* in the investigator's affidavit.

And in *State* v. *Chrisiy, supra,* the court says, at page 69 of 112 N. J. Super:

> "• • • In this case, observations of the premises by an undercover detective substantiated some of the rudiments of the informant's story. On each of six days Anthony Rotunda and Frank Cerino, who had been identified by the informer, • • • were seen frequenting the location."

2. The investigating officer's own observations did not add up to probable cause that a crime was being committed in Mrs. Kotsak's delicatessen. What did his affidavit show? Just this. He saw a number of persons enter the store and come out shortly thereafter, with no packages or purchases observable. A few of them were

counting money when they came out, one went in and out with a pocketbook and a white box and another one took a small piece of white paper from his pants pocket, looked at it and put it back (D4a-5 to 6a-8). Probable cause, indeed!

There was nothing in the affidavit to justify a reasonable belief that any of the observed persons had done anything other than purchae small items, like a pack of cigarettes, a cigar, candy or gum or some other item that could be placed in a man's pocket or a woman's pocketbook. The affidavit does not aver that such items were not sold in the defendant's delecatessen. Counting money? That could be change. *One* person going in and out with a white box? *One* person taking a small piece of white paper from his pants pocket, looking at it and putting it back? Not a shred of evidence, even in a loose connotation, can be derived from the particulars observed by Walsh that those persons had been placing or cashing in on *bets*. See *State* v. *Kline,* 42 N. J. 135 (1964).

The facts observed might show such a possibility but possibility is not enough. See *Frantom* v. *State,* 72 A. 2d 744 (Ct. of App. of Md. 1950). In *Hall* v. *State,* 5 Md. App. 394, 247 A. 2d 548, 551-552 (1968), the court says:

> "Unusual numbers of persons going to and from the premises are circumstances which may be given weight in determining the existence of probable cause. * * * But here the suspect premises were not a private residence, but a store, characterized as a grocery store in the affidavit. The affidavit does not allege that a grocery business was not being conducted on the premises and that the store was not open to such persons who from time to time desired to buy the goods on sale. It cannot

be ascertained from the affidavit if the number of persons the affiant observed enter the store was unusual for the lawful business being conducted or that they were other than bona fide customers of the grocery store. * * * The observations of the officer were discontinued before noon each day, so the affidavit does not show whether more persons or fewer persons or about the same number entered the store in the afternoon hours as were seen to enter in the morning. Nor does it show any precautionary measures to prevent intrusion of unwanted guests or to prevent detection. * * * While the incidence of brown (552) paper bags as standard numbers equipment has been noted * * * here only two women carrying small brown paper bags were seen on one day entering the store. No numbers were seen played or written or received and no lottery slips were seen in the possession of anyone. On one occasion a man was seen to hand another man who came out of the store several slips of white paper and money. The man receiving these items did not *reenter* the store but drove away. There was no indication as to the size of the slips, whether they were of a type generally used in the operation of a lottery * * *, whether they contained numbers of writing of any kind or whether they appeared to be number slips. * * *

"We do not think that the trial judge was justified in finding probable cause for the issuance of the warrant."

Compare *Application of Berlin,* 19 N. J. 522 (1955).

It is true that the investigator's affidavit at bar also contains the following statement (D6a-20 to 22):

> "In my previous experience as a police officer I have observed gambling operations of this type to be generally conducted in this manner."

But that is purely conclusory in implying that what he had observed was a gambling operation. The sufficiency of the affidavit upon which a search warrant is issued "must be tested by its statements of fact rather than by its conclusions." *Kasprowicz* v. *United States,* 20 F. 2d 506, 507 (6th Cir. 1927). The court went on to say:

> "* * * We therefore disregard the allegation made in terms that the premises were being used for business purposes and for the sale of intoxicating liquor, and look only to the circumstances expressly stated."

And in *Spinelli* v. *United States, supra,* the court says, at page 645 of 21 L. Ed. 2d:

> "* * * All that remains to be considered is the flat statement that Spinelli was 'known' to the FBI and others as a gambler. But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient."

The cases cited by the Appellate Division in the instant connection would seem to be distinguishable. In *State* v. *Contursi,* 44 N. J. 422, 432-433 (1965) the Court says:

> "But defendant's conduct in the phone booth on being observed, coupled with everything else we have mentioned, was enough to make out adequate prob-

> able cause to arrest on appropriate application of the principles earlier discussed. The telephone conversation, with slips of paper in hand, the prompt hanging up of the receiver, the furtive attempt to conceal the paper by sliding it under his leg and then into his pants pocket and the effort to leave the booth apparently empty-handed were sufficient to ground a reasonable, well-founded belief, in the light of the lieutenant's background and other knowledge, that the defendant was taking bets over the phone from his customers or reporting previously received (433) wagers to his superiors in the criminal chain and so that bookmaking was then and there being committed or had been."

In *State* v. *Boyd,* 44 N. J. 390, 393 (1965), the affidavit recited that on surveillance by the affiant, the *person described* in the *informant's* tip was seen in the vicinity described in the informant's tip,

> "in conversation with various people, and on occasion slips of paper changed hands."

See, also, the remaining, nonspecifically *corroborated* portions of the informant's tip in the same case, same page.

Compare, also, *State* v. *Kasabucki,* 52 N. J. 110, 118 to 123 (1968); *State* v. *Mercurio,* 113 N. J. Super. 113, 115, elaborated in the dissenting opinion at page 117 (A. D. 1970), affirmed 57 N. J. 367 (1971).

POINT III

In holding that the police properly entered the living area on the first floor, notwithstanding the warrant limitation to the delicatessen place of business, the Appellate Division went contrary to the decisions of the Supreme Court of the United States and the prohibition in the Fourth Amendment.

In the last full paragraph of its opinion, the Appellate Division says:

> "We find no merit in the contention that the police improperly entered the living area on the first floor. Probably through inadvertence the warrant was limited to the delicatessen premises and the person of Mrs. Kotsak, although as already noted the application for the warrant included the entire first floor."

That was no inadvertence. The informant's tip was limited to the store (D3a-17 to 4a-4):

> "* * * delivering lottery numbers and numbers * * * at the delicatessen * * * lottery numbers are also telephoned into this store * * *."

All of the investigator's observations were limited to the street outside of the store. He didn't even say that he could see into, or anything inside of, the store, much less the living quarters. No wonder Judge Kingfield cut down the affiant's request from the entire first floor to the entire of the place of business.

The affidavit in support of a search warrant must establish probable cause for the charge that a crime is being committed at the premises *sought to be searched.* See

Dumbra v. *United States,* 268 U. S. 435, 440-441 (1925). Here, Judge Kingfield's warrant *must* be taken to reflect his opinion that probable cause did not exist for a search warrant beyond "the entire of the place of business," as *indeed* it did not. In *State* v. *Kline,* 42 N. J. 135, 138 (1964), the Court says:

> "• • • No facts or circumstances were set forth in the affidavit which afforded reasonable grounds to believe that bookmaking was being carried on in the home, or that bookmaking paraphernalia was to be found there."

By reason of the foregoing, the warrant at bar cannot from any point of view be said, legally or reasonably, to have given any right to enter or search the kitchen, or any other part of Mrs. Kotsak's living quarters.

In *People* v. *Castree,* 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357, 359, the court says:

> "• • • Warrants may issue, but not without probable cause, supported by affidavit, and only to search the place particularly described. A search without a warrant is an unreasonable search, and a search of a place not described is without a warrant and unreasonable. The search of the plaintiff in error's dwelling under a warrant particularly describing a store was unreasonable, and therefore was an invasion of the right of security guaranteed him • • •."

In *Giusti* v. *United States,* 4 F. 2d 703 (5th Cir. 1925), the court says:

> "• • • Giving the warrant full effect, it did not authorize the search of separate and distinct prem-

ises, although in the same building, as it covered the grocery store and nothing else."

"The authority to search is limited to the place described in the warrant and does not include additional or different places." *Keiningham* v. *United States*, 287 F. 2d 126, 129 (App. D. C. 1960).

CONCLUSION

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

SEAMAN, WILLIAMS & SEAMAN,
Attorneys for Petitioner,
By: ALBERT W. SEAMAN,
A Member of the Firm.

SAM WEISS,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2251-69

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARY ANTIPOROVITCH KOTSAK,

Defendant-Appellant.

Argued March 30, 1971—Decided April 27, 1971.

Before JUDGES LEWIS, MATTHEWS and MINTZ.

On appeal from the Middlesex County Court.

Mr. Sam Weiss argued the cause for appellant (*Messrs. Seaman, Williams & Seaman,* attorneys).

Mr. John J. Pribish, Assistant Prosecutor, argued the cause for respondent (*Mr. Edward J. Dolan,* Middlesex County Prosecutor, attorney).

PER CURIAM.

Appendix A

Defendant appeals from a judgment of conviction following a jury verdict for (a) engaging in a lottery business and possessing lottery slips in violation of N.J.S.A. 2A:121-3; (b) bookmaking and maintaining a gambling resort in violation of N.J.S.A. 2A:112-3. She received four concurrent indeterminate sentences to the New Jersey Reformatory for Women and total fines in the amount of $6,000.

On appeal defendant challenges the legality of the search warrant under which all the evidence against her was seized. Specifically, she contends (a) that probable cause did not exist to support the issuance of a warrant, and (b) that the search warrant went beyond premises described in the warrant.

On December 18, 1968, a Superior Court judge issued a warrant to State Police Investigator Thomas H. Walsh empowering him to "search the entire of the place of business and of the white female" Mary Kotsak. This warrant was issued upon the affidavit of Walsh, wherein he deposed that he had reason to believe that lottery operations were being conducted in a delicatessen run by Mary Kotsak on the ground floor of a two-story building at 169 Pulaski Avenue, Perth Amboy.

This recitation was based on the results of a surveillance begun on December 6, 1968 following a tip from a reliable informant that between 1:00 P.M. and 4:00 P.M. men and women were delivering lottery numbers to the delicatessen. The informant, whose previous cooperation had led to convictions for gambling, also told Walsh that numbers were being reported into the store by telephone. Walsh thereupon set up a surveillance of the delicatessen from a boarded-up church. On the first day,

Appendix A

Monday, December 9, Walsh observed "numerous" vehicles park and double park, their drivers entering and leaving the store empty-handed. Walsh's surveillance lasted from 1:30 P.M. to 3:30 P.M. He did not specify how many persons, if any, left the store with visible packages. Likewise, he gave no indication of the general traffic volume in the neighborhood. He further gave no indication that any of the persons entering the store were known to him as gamblers.

Walsh returned at 2:00 P.M. the next day and saw "many" persons approach the store in vehicles and on foot, apparently around 2:45 P.M. One of these persons double-parked his car and emerged from the store counting money, but was otherwise empty-handed.

Between the hours of 2:00 P.M. and 4:00 P.M. on the following day, Wednesday, December 11, Walsh again observed the delicatessen from his vantage point. This time he saw "many" people enter and leave the store without any visible signs of having made a purchase. Particularly, around 3:30, two black persons entered the store and came out approximately four minutes later, one counting money and then giving it to the other. Neither carried any purchases. Finally, on Friday, the 13th, Walsh set up a surveillance at 2:15 P.M. and observed the delicatessen until 4:00 P.M. Again "many" persons entered and left without packages, among them a man who emerged counting money, a pedestrian who was counting money, and a woman carrying a white box who arrived and left by taxi. Additionally, around 3:00 P.M. a white man entered the store followed by a black person. The black man left five minutes later empty-handed. The white man remained three additional minutes and,

upon exiting, took out an unidentified slip of white paper, looked at it, put it back in his pocket and left. Based upon the foregoing, Walsh applied for a search warrant "to include the entire first floor and cellar and all back rooms of this delicatessen at 169 Pulaski Avenue and the person of Mary Kotsak * * *."

Pursuant to the search warrant the officers raided the delicatessen on December 18, 1969. Finding the store empty, they proceeded into contiguous rear living quarters wherein defendant and two other persons were gathered. Apparently in plain view on a kitchen table and in other places were the following articles: (a) horse bet slips; (b) Star-Ledger sports section; (c) numbers betting slips; (d) various racing papers; (e) tally sheets. Taken from drawers in the living quarters were similar items as well as $2,358.62 in cash. $415.62 was confiscated from behind the counter in the kitchen.

No timely motion to suppress was made. However, at the trial the judge allowed defendant to attack the sufficiency of the warrant. He then upheld the search in all respects.

Defendant first claims the warrant was not supported by anything approaching probable cause, being grounded in nothing more than mere suspicion. We disagree. Under *Spinelli* v. *United States,* 393 U. S. 410 (1969) and *Aguilar* v. *Texas,* 378 U. S. 108 (1964) an informant's tip will not serve to establish probable cause unless the issuing judge has a sufficient basis for terming the informant reliable by viewing, at least cursorily, his past reliability and, more thoroughly, the facts upon which the informant makes his statement. However, where properly corroborated, an informant's suspicions may be ele-

vated to the level of probability. This will occur when corroborative observations "confirm enough of what the informant has disclosed so that the balance of his disclosures are invested with an aura of credit." See *State* v. *Christy,* 112 N. J. Super. 306 (Cty. Ct. 1970); *Draper* v. *United States,* 358 U. S. 307 (1959). An insufficient tip may be taken together with other corroborative events in order to formulate probable cause. Similarly, when "independent observations corroborate sufficient details of the tip (whether suspicious or not) to negate the possibility that the informer 'fabricate[d] his report out of whole cloth,'" probable cause may be found. See *Gonzalez* v. *Beto,* 425 F. 2d 963 (5 Cir. 1970).

The State need not exclude all innocent possibilities for the inquiry as to whether probable cause exists is a flexible one. *State* v. *Contursi,* 44 N. J. 422 (1965); *State* v. *Kasabucki,* 52 N. J. 110 (1968). In considering such questions, the good faith and expertise of the officer who took the time and trouble to secure the warrant should be taken into account. Furthermore, the reviewing court should pay substantial deference to a finding of probable cause by the trial court. *State* v. *Kasabucki, supra.* We find the series of incidents detailed in Walsh's affidavit amply support a finding of probable cause. The affidavit upon which the search warrant issued is more informative than that in *State* v. *Mercurio,* 113 N. J. Super. 113 (App. Div. 1970), affirmed o.b. 57 N. J. 367 (1971), where the court held that in marginal cases the doubt should be resolved by sustaining the search.

We find no merit to the contention that the police improperly entered the living area on the first floor. Probably through inadvertence the warrant was limited to the

delicatessen premises and the person of Mrs. Kotsak, although as already noted the application for the warrant included the entire first floor. *State* v. *Daniels,* 46 N. J. 428 (1966), makes clear that warrant requirements need not be entirely precise. *Cf. State* v. *Boyd,* 44 N. J. 390 (1965), where it is recognized that haste will often make it difficult to comply with proper procedures. See also *State* v. *Aiello,* 91 N. J. Super. 457 (App. Div. 1966), certif. den. 48 N. J. 138 (1966), cert. den. 388 U. S. 913 (1967).

The judgment of conviction is affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey, Denying Certification

(Filed—September 2, 1971.)

SUPREME COURT OF NEW JERSEY

C-10 SEPTEMBER TERM 1971

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MARY ANTIPOROVITCH KOTSAK,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of September, 1971.

IRVING B. ZUCKNER
Acting Clerk of the Supreme Court